

# KALISPEL TRIBE – ACTION AGENCY MOA

## MEMORANDUM OF AGREEMENT BETWEEN THE KALISPEL TRIBE, THE BONNEVILLE POWER ADMINISTRATION, THE U.S. ARMY CORPS OF ENGINEERS, AND THE U.S. BUREAU OF RECLAMATION

### I. INTRODUCTION

The Bonneville Power Administration (“**BPA**”), the U.S. Army Corps of Engineers (“**Corps**”) and the U.S. Bureau of Reclamation (“**Reclamation**”) (collectively, “**Action Agencies**”) and the Kalispel Tribe of Indians (“**Kalispel Tribe**” or “**Tribe**”) have developed this Memorandum of Agreement (“**Agreement**” or “**MOA**”) through good faith negotiations to address for the term of the Agreement issues associated with the direct and indirect effects of construction, inundation, and operation and maintenance of the Federal Columbia River Power System (“**FCRPS**”) and Reclamation’s Upper Snake River (“**Upper Snake**”) Projects on the fish and wildlife resources of the Columbia River Basin. The Action Agencies and the Tribe (collectively, “**the Parties**”) intend to provide for a long-term agreement that provides benefits to all the Parties.

Specific reasons for this Agreement include the following:

- To address legal mandates for the FCRPS and Upper Snake Projects under the Endangered Species Act (“**ESA**”), the Northwest Power Act (“**NPA**”), and the Clean Water Act (“**CWA**”);
- To address the Parties’ mutual concerns for certainty and stability in the funding and implementation of projects for the benefit of fish and wildlife affected by the FCRPS and Upper Snake Projects, affirming and adding to the actions in Biological Opinions for salmon and steelhead, and bull trout (collectively, “**BiOps**”); and
- To foster a cooperative and collaborative relationship in the implementation of the mutual commitments in this Agreement.

With this Agreement, therefore, BPA commits to long-term funding and the Action Agencies collectively make commitments for implementation activities to support the protection and recovery of fish and wildlife affected by the FCRPS and Upper Snake Projects, in a manner that recognizes the Kalispel Tribe as a governmental partner in the pursuit of protection and recovery of the affected fish and wildlife. The BPA funding and implementation commitments are set out in greater detail in the project list and spreadsheet included as **Attachment A** and the Project Abstracts set forth in **Attachment B**, each of which is incorporated by reference into this Agreement. The Corps’ and BPA’s commitments to certain implementation activities associated with actions and operations at Albeni Falls Dam appear in **Attachment C**, which is also incorporated by reference into this Agreement. In addition to providing certainty and stability to their shared efforts, the Parties also intend this Agreement to resolve for its term a broad range of issues associated with tribal claims and concerns related to the direct and indirect effects of construction, inundation, and operation and maintenance of the FCRPS and the Upper Snake Projects, on the fish and wildlife resources of the Columbia River Basin.

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### Definitions

“**Action Agencies**” means the Bonneville Power Administration (“**BPA**”), the U.S. Army Corps of Engineers (“**Corps**”) and the U.S. Bureau of Reclamation (“**Reclamation**”) who collectively operate and maintain the FCRPS and jointly initiate ESA consultation on effects of the FCRPS on listed species. Each agency’s respective role and responsibilities with respect to the FCRPS is described further in Section I.B.

“**AMIP**” means the Adaptive Management Implementation Plan issued by the Action Agencies in September of 2009, and included as part of the NOAA FCRPS BiOps.

“**APA**” means the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

“**BiOps**” collectively means the USFWS FCRPS BiOp, the NOAA FCRPS BiOps, and the Upper Snake BiOp.

“**BPA’s Capitalization Policy**” means BPA’s policy statements regarding its capital investments, including the Fish and Wildlife Capitalization Policy.

“**BPA’s In-lieu Policy**” means BPA’s policy statements regarding implementation of the “in lieu” restriction on BPA fish and wildlife funding under the NPA.

“**Columbia Basin Fish Accords**” means the memoranda of agreement entered into on May 2, 2008 (Three Treaty Tribes-Action Agencies, Colville-Action Agencies, Idaho-Action Agencies, and Montana-Action Agencies agreements) and November 7, 2008 (Shoshone-Bannock Tribe-Action Agencies).

“**Council**” means the Northwest Power and Conservation Council.

“**Council Program**” means the Council’s fish and wildlife program to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, on the Columbia River and its tributaries developed and adopted pursuant to the Northwest Power Act.

“**CWA**” means the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1387, generally referred to as the Clean Water Act.

“**ESA**” means the federal Endangered Species Act, 16 U.S.C. §§ 1531-1544.

“**FCRPS**” or “**FCRPS Projects**” means the Federal Columbia River Power System that, for purposes of this Agreement, is comprised of 14 Federal multipurpose hydropower projects. The 12 projects operated and maintained by the Corps are: Bonneville, The Dalles, John Day, McNary, Chief Joseph, Albeni Falls, Libby, Ice Harbor, Lower Monumental, Little Goose, Lower Granite, and Dworshak dams. Reclamation operates and maintains the following FCRPS projects: Hungry Horse Project and Columbia Basin Project, which includes Grand Coulee Dam.

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“**FCRPS BA**” means the “Biological Assessment for Effects of Federal Columbia River Power System and Mainstem Effects of Other Tributary Actions on Anadromous Salmonid Species Listed Under the Endangered Species Act” issued by the Action Agencies in August of 2007.

“**Hydro**” means hydropower generation of the FCRPS.

“**NEPA**” means the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*

“**NOAA**” means the National Oceanic and Atmospheric Administration.

“**NOAA FCRPS BiOps**” collectively means the FCRPS Biological Opinion issued by NOAA Fisheries to BPA, the Corps, and Reclamation on May 5, 2008 (“**2008 NOAA FCRPS BiOp**”) and the Adaptive Management Plan (“**AMIP**”), which were incorporated into the 2010 Supplemental BiOp released on May 20, 2010 (“**2010 Supp. BiOp**”) addressing the effects of the operation and maintenance of the FCRPS on ESA-listed salmon and steelhead, and available at [www.salmonrecovery.gov](http://www.salmonrecovery.gov).

“**NPA**” or “Northwest Power Act” means the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §§ 839-839h.

“**NHPA**” means the National Historic Preservation Act, 16 U.S.C. §§ 470a *et seq.*

“**Policy Team**” means policy representatives from the BPA, Corps, and the Kalispel Tribe who have the authority to make decisions regarding the planning and implementation of actions in Attachment C.

“**Technical Management Team**” (“**TMT**”) means one of the technical teams within the Columbia River Regional Forum established by the NMFS, USFWS, the Corps, Reclamation, and BPA to make recommendations to the Action Agency with authority to make operational decisions on dam and reservoir operations that affect fish. The TMT is comprised of regional sovereigns and is tasked with using the best available technical and scientific information in making and considering recommendations on FCRPS operations that effect fish.

“**Upper Snake Projects**” means the Minidoka, Palisades, Michaud Flats, Ririe, Little Wood River, Boise, Lucky Peak, Mann Creek, Owyhee, Vale, Burnt River, and Baker projects operated by the Bureau of Reclamation.

“**Upper Snake BiOp**” means the “Consultation for the Operation and Maintenance of 10 U.S. Bureau of Reclamation Projects and 2 Related Actions in the Upper Snake River Basin above Brownlee Reservoir Biological Opinion” issued by NOAA Fisheries to Reclamation on May 5, 2008 addressing listed salmon and steelhead.

“**USFWS**” means the United States Fish and Wildlife Service.

“**USFWS FCRPS BiOp**” means the December 20, 2000, Biological Opinion issued by the USFWS to the Action Agencies entitled “Effects to Listed Species from Operations of the

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Federal Columbia River Power System” addressing effects of the operation and maintenance of the FCRPS on threatened bull trout and the endangered Kootenai River white sturgeon, and any Biological Opinion issued by the USFWS subsequent to execution of this agreement regarding the effects to listed species from the operation and maintenance of the FCRPS. For purposes of this Agreement, the term “USFWS FCRPS BiOp” does not include the USFWS 2006 BiOp regarding Libby Dam or its clarified Reasonable and Prudent Alternative issued in December of 2008.

### **A. Recital of Kalispel Tribe’s Rights and Interests**

The Kalispel Tribe asserts the following rights and interests:

- Portions of the Pend Oreille River and its tributaries lie within the boundaries of the Kalispel Reservation, as established in the Executive Order of 1914.
- The Tribe is a significant landowner along the Pend Oreille River, both within and outside Reservation boundaries, and also acts as the primary manager and regulatory entity for lands within Reservation boundaries and some lands outside the Reservation.
- The Tribe holds reserved hunting, gathering, and fishing rights within the Kalispel Reservation. The Tribe also holds reserved water rights including, but not limited to, the right to a sufficient quantity and quality of water necessary to support the purposes of the Reservation.
- The Tribe’s federally protected hunting, gathering, and fishing rights within the Reservation include, but are not limited to, the right to harvest a fair share of all natural resources originating or located on or passing through the Reservation and the right to manage those natural resources in those areas.
- The Tribe thus has critical and fundamental interests in the Pend Oreille River, including its tributaries, and the upper Columbia River, and the fish and wildlife resources in these rivers.
- The Tribe has a particularly strong interest in native fish such as bull trout, westslope cutthroat trout, and mountain whitefish. In fact, the Kalispel Reservation was strategically located to include the mouth of Calispell Creek because of its singular importance to tribal fishermen as a dependable fall fishery for these species.
- The development of the FCRPS, and federal licensing of non-federal hydroelectric projects, has had significant, long-term adverse effects on the culture, natural resources, and economy of the Kalispel Tribe.

Nothing in this Agreement is intended to determine, settle, or concede the precise location of the Kalispel Reservation boundaries or to concede, quantify, settle, or diminish any aspects of the Tribe’s water or fishing rights. The intent of the Kalispel Tribe in entering this Agreement is to maintain consistency with all of the Tribe’s claims of rights and interests, while also aiding the

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Action Agencies in meeting obligations under the ESA and other laws. The fact that any right or interest of the Kalispel Tribe, or any claim thereof, is not set forth in these Recitals is not intended to be a waiver thereof.

### **B. Federal Agencies**

The Corps and Reclamation are the federal agencies with the authority and responsibility to operate and maintain the FCRPS/Upper Snake projects for multiple purposes in accordance with federal law. These agencies must adhere to their specified authorities and are unable to make commitments that they do not have specific authority to make. BPA is the federal agency with the authority and responsibility to market the power produced from the FCRPS projects, and to provide for protection, mitigation, and enhancement of fish and wildlife affected by the development and operation of the FCRPS projects in accordance with federal law.

### **C. Agreement Principles**

This Agreement is founded on the following principles:

- Mitigation for the effects of the FCRPS/Upper Snake projects should be based first on biologically sound operations of the hydroelectric system, to the extent economically feasible, which will protect and enhance fish and, where relevant, wildlife resources based on the best available scientific information.
- The Action Agencies will make operational decisions giving consideration to the interests of each affected sovereign state and tribe through agreed-upon forums.
- The Action Agencies will seek to ensure that operational measures aimed at the survival and recovery of ESA-listed salmon and steelhead do not adversely impact non-listed native species, and where such impacts are unavoidable, that the impacts are minimized where reasonably practical to do so, giving consideration to the interests of each affected sovereign as described in the preceding principle.
- Additional mitigation (non-operations) for the effects of the FCRPS/Upper Snake projects should consider “All Hs,” including habitat, hatchery, harvest, and predator management measures, and should be biologically effective and cost effective (addressing biological objectives at the least cost for similar results).
- Mitigation funding and operational priorities should reflect the identified biological needs (e.g., the “survival gaps” of the NOAA FCRPS/Upper Snake BiOps) and limiting factors for affected fish and wildlife, as well as the magnitude of FCRPS/Upper Snake projects effects.
- Each Party reserves all rights, powers, and remedies now or hereafter existing in law, by statute, executive order, regulation, or otherwise, in participating in this MOA. Nothing in the MOA shall be construed to be a waiver of the sovereign immunity of the Kalispel Tribe or the United States.

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- The commitments for funding and implementation activities addressed in this Agreement do not establish any new administrative procedures or forums for review or approval of these commitments.
- Each of the Action Agencies, as a part of the federal government, has a general trust responsibility to the Tribe and this Agreement will be implemented in a manner consistent with that trust responsibility.

## II. HYDRO AND RELATED COMMITMENTS

### **A. Hydro Performance and Related Items, NOAA FCRPS and Upper Snake BiOps**

#### **A.1. Performance Standards, Targets, and Metrics**

For the term of this Agreement, the Tribe concurs in use of the hydro performance standards, targets, and metrics as described in the Main Report, Section 2.1.2.2 of the Action Agencies' FCRPS BA (pages 2-3 through 2-6) and the NOAA 2008 FCRPS BiOp at RPA No. 51 (pages 70-74 of 98), and incorporated into the 2010 Supp. BiOp. The Tribe and its representatives may recommend to the Action Agencies actions that may exceed performance standards, which will be considered and may be implemented at the discretion of the Action Agencies.

#### **A.2. Performance and Adaptive Management**

The Parties agree that the NOAA FCRPS and Upper Snake BiOps will employ an adaptive management approach, including reporting and diagnosis as described in Section 2.1 of the FCRPS BA and incorporated into the 2010 Supp. BiOp. The Parties agree that if biological or project performance expectations as described in the 2010 Supp. BiOp are not being met over time as anticipated, diagnosis will be done to identify causes, and applicable remedies will be implemented to meet the established performance standard consistent with the 2010 Supplemental BiOp. The hydro performance standard for species or the federal projects will not be lowered during the terms of the BiOps (although as provided in the NOAA FCRPS BiOps, tradeoffs among Snake River and lower Columbia River federal dams are allowed).

The Parties recognize that new biological information will be available during the term of this Agreement that will inform the methods and assumptions used to analyze the effects of hydro operations on fish species covered by this Agreement. The Parties will work together to seek agreement on methods and assumptions for such analyses, building on analyses performed in development of the NOAA FCRPS BiOps as warranted.

As described in the NOAA FCRPS BiOps, a comprehensive review will be completed in June 2013 and another in June 2016 and each will include a review of the state of implementation of all actions planned or anticipated in the NOAA FCRPS BiOps. The Parties agree that they will jointly discuss the development, analyses, and recommendations related to these comprehensive evaluations, and in the event performance is not on track, they will promptly discuss options for corrective action consistent with the AMIP.

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This adaptive management process will also include consideration of new information for compliance with performance standards and progress toward meeting targets (and potentially for establishing revised performance standards and targets at the end of the Agreement term). The Kalispel Tribe may seek to have new information evaluated for meeting the NOAA FCRPS BiOps hydro performance standards.

### **A.3. Research, Monitoring, and Evaluation**

Maintaining and improving a research, monitoring, and evaluation (“**RM&E**”) program is critical to informed decision making on population status assessments and improving management action effectiveness. For the term of the Agreement, the Parties agree that the RM&E program provided in the NOAA FCRPS and Upper Snake BiOps and this Agreement provide a satisfactory RM&E program that addresses critical uncertainties. The Action Agencies will implement status and effectiveness RM&E sufficient to robustly track survival improvements and facilitate rebuilding actions accomplished, in part, through projects and programs identified in the NOAA FCRPS BiOps. The Parties further agree that the Action Agencies’ efforts may be coordinated with other sovereign partners including state and tribal fishery managers.

### **A.4. Spill/Transport**

For the term of this Agreement, the Parties agree that implementation of the spill and fish transportation measures in the NOAA BiOps, subject to adaptive management as provided in those BiOps, satisfy ESA and NPA requirements with respect to salmon and steelhead affected by the FCRPS and Upper Snake Projects.

### **A.5. Flow Actions**

For the term of this Agreement, the Parties agree to the flow and water management actions in the NOAA and Upper Snake BiOps and further recognize the need for such actions to be consistent with the Snake River Water Rights Act of 2004, Pub. L. No. 108-447, Div. J, Title X, 118 Stat. 2809, 3431. Also, for the term of this Agreement, the Parties agree to the water management strategies for “Summer reservoir operations at Hungry Horse and Libby, Grand Coulee and Dworshak Dams” contained in the Council’s 2009 Program as to Hungry Horse and Libby Dams. Finally, for the term of this Agreement, the Parties agree to the Albeni Falls Dam actions and operations called for in Section II.C and Attachment C of this MOA.

## **B. USFWS FCRPS BiOp and Re-initiation of Consultation**

**B.1.** The Parties acknowledge that the USFWS recently finalized a new bull trout critical habitat designation. Based on this revised designation, the Action Agencies are preparing to re-initiate consultation under Section 7 of the ESA with the USFWS.

**B.2.** The appropriate Action Agencies will work collaboratively with the Tribe before and during the consultation process, including but not limited to development of a proposed action for the

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Albeni Falls chapter of the Biological Assessment. The Action Agencies agree to fully consider the Tribe's recommendations and proposals, but have no obligation to adopt them while this Agreement is in effect. The Action Agencies' proposed action will include measures related to bull trout passage called for in the USFWS FCRPS BiOp as well as other measures agreed to by the Action Agencies to assist in meeting their ESA responsibilities (to avoid jeopardy and to avoid adverse modification of critical habitat). To accommodate new biological information that may become available during the term of this Agreement, the agencies will include an adaptive management provision in the proposed action to provide for appropriate adjustments to operations at Albeni Falls Dam.

**B.3.** The Action Agencies agree that upon receipt of the USFWS biological opinion or concurrence letter, the Action Agencies will each produce a decision document identifying their intent to implement the actions in the biological opinion. If either the Corps or BPA is not prepared to adopt all elements recommended by the USFWS, then the Agency will discuss its reasons with the Tribe and consider any timely feedback submitted by the Tribe before issuing a final decision. The Corps, BPA, and the Tribe commit to work together on implementation of the Albeni Falls Dam component of the biological opinion as described in their respective decision documents. The Corps and BPA will work closely with the Tribe to address funding and implementation issues, if they arise, for the Albeni Falls Dam component of the biological opinion for the term of this Agreement.

**B.4.** While this Agreement is in effect, and provided the Parties abide by its terms, the Tribe agrees not to challenge the adequacy or implementation of the USFWS FCRPS BiOp for bull trout or any new or revised BiOp issued by the USFWS regarding bull trout as a result of the re-initiated consultation described in paragraph B.1 above (see Section V.I).

### **C. Albeni Falls Actions and Operations: Collaboration and Coordination** **Process and Products**

#### **C.1. General Principles**

A central purpose of this MOA is to enhance the Tribe's ability to contribute its policy perspective and technical expertise in discussions with the Corps and BPA regarding ongoing and proposed actions and operations at Albeni Falls Dam that may affect fish, wildlife, and water temperature of importance to the Tribe. Areas of particular concern to the Parties include providing Albeni Falls Dam water management operations supportive of bull trout and other aquatic species in the Pend Oreille River to the maximum extent practicable, and Albeni Falls bull trout passage. The Tribe, Corps, and BPA share a concern regarding how operations of Albeni Falls Dam affect tribal interests in the natural resources of the Pend Oreille River and its tributaries, and will collaboratively seek to address any adverse effects to those interests through this Agreement. The Tribe acknowledges that Albeni Falls Dam must be operated to meet multiple purposes and that final operational decisions rest with the Corps.

The Corps, BPA, and the Tribe agree that collaboration in these areas will enable them to use the best available technical information to advance their common interest in protecting the natural resources of the Pend Oreille River and greater Columbia River Basin. Details of the



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collaboration and coordination processes and their related products can be found in Section II.C.2, below. The products of this collaboration and coordination will include planning for Albeni Falls Dam operations with integration into the FCRPS Water Management Plan and following the process to jointly develop an Action Plan (with annual updates as described in greater detail in Section II.C.2.b below), setting forth priority annual action items to help obtain the long-term objectives of Section II.C identified below. The Corps agrees to seek appropriations consistent with the Corps' budgetary guidance to provide continuity in the development of and/or implementation of agreed upon activities and projects pursuant to the MOA.

### *C.1.a. Albeni Falls Dam Water Management Operations*

#### **(1) Long-term Objective**

Enhance collaboration and coordination among the Corps, BPA, and the Tribe to understand and consider potential impacts of Albeni Falls Dam on natural resources of the Pend Oreille River prior to implementing operational decisions. A water management action of particular interest to the Corps, BPA, and the Tribe is an investigation of operating Albeni Falls Dam in late summer and early fall to improve downstream water temperature for bull trout and other aquatic species in the Pend Oreille River.

#### **(2) Implementation Principles**

- The Corps, BPA, and the Tribe agree to discuss ongoing and proposed water management operations and their potential impacts on fish, wildlife, and water temperature in the Pend Oreille River.
- The Corps, BPA, and the Tribe share a concern regarding the operation of Albeni Falls Dam and whether this operation affects water temperature supportive of bull trout and other aquatic species in the Pend Oreille River.
- The Corps, BPA, and the Tribe recognize that there are various contributing factors and sources that may affect water temperature and applicable water quality standards for the Pend Oreille River including, but not limited, to the operation of Albeni Falls Dam.
- Where there are conflicting water temperature concerns between bull trout and non-ESA listed aquatic species, the criteria that are most protective of bull trout, based on the best available science, will take priority.
- The Corps, BPA, and the Tribe agree to share with each other relevant non-privileged and non-sensitive technical information concerning the operation of Albeni Falls Dam in order to fully consider potential impacts on fish, wildlife, and water temperature.

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### *(3) Phased Approach to Evaluate Experimental Releases*

The Tribe, BPA, and the Corps agree to evaluate experimental releases to assess the effect of operations at Albeni Falls on water temperature downstream of Albeni Falls Dam for the benefit of bull trout and other aquatic species. To make this assessment, the Corps and the Tribe agree to engage in a joint investigation of operational adjustments through modeling analyses and experimental releases for downstream water temperature moderation. This investigation will be conducted in three phases.

In phase 1, a technical team will evaluate, through modeling, the relationship between potential operational adjustments and downstream water temperature. During this phase, both post- and pre- Labor Day operational releases for downstream water temperature moderation will be evaluated using the Albeni Falls CE-QUAL W2 Model and the Box Canyon Model.

In phase 2, information derived from the phase 1 modeling effort will be used by the technical team to develop criteria for the timing and duration of post-Labor Day experimental releases.<sup>1</sup> The experimental post-Labor Day release operation will be implemented through the process described in Section II.C.2.a, below. A monitoring plan for experimental releases for downstream water temperature moderation will also be developed during this phase.

In phase 3, the Corps and the Tribe will use information from the modeling effort and experimental releases, and monitoring results, to inform future operations, and if appropriate, the requisite processes necessary to consider a decision to implement a pre-Labor Day release<sup>2</sup> in a revised long-term operational plan. The Corps and the Tribe agree that a primary objective in a revised long-term operational plan is moderation of downstream water temperatures supportive of bull trout and other aquatic species in the Pend Oreille River to the maximum extent practicable.

These phases will be accomplished by scheduling and completing actions for each fiscal year as described in the Action Plan (see Section II.C.2.b below). The Parties agree to work toward completing all three phases as expeditiously as possible. The Tribe will support this approach while this Agreement is in effect, provided that the Corps timely performs the actions it agrees to take in the Action Plan.

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<sup>1</sup> The Water Control Manual currently permits initiation of Albeni Falls drafts after Labor Day. For an early post-Labor Day initiation of releases, appropriate coordination with the public and regional forums such as the Technical Management Team would occur.

<sup>2</sup> Amendments to the Water Control Manual would occur if the operational changes are not currently addressed by the project's existing documentation. Implementation of a pre-Labor Day release for downstream water temperature moderation requires additional processes and analyses ensuring that the proposed operational change is consistent with applicable statutes and regulations, including the Corps's ESA and NEPA responsibilities, and modification of the existing Water Control Manual pursuant to 33 C.F.R. 222.5.

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### C.1.b. Albeni Falls Bull Trout Passage

#### **(1) Long-term Objective**

Expediently complete the 2000 USFWS FCRPS BiOp requirements related to bull trout passage including completing the feasibility study, or appropriate planning document, and should passage be feasible, work through agency decision-making processes and associated funding requests in rapid progression. The Corps has requested funding for the completion of an injury/mortality entrainment study and a rates/routines/timing entrainment study that would look at overall entrainment of bull trout along with other species at Albeni Falls Dam.

#### **(2) Implementation Principles**

- The Corps agrees to address bull trout passage feasibility by scheduling and completing a discrete set of actions for each fiscal year as described in the Action Plan (see Section II.C.2.b below). The Tribe will support this approach while this Agreement is in effect, provided that the Corps timely performs the actions it agrees to take in the Action Plan.
- If the Corps, in consultation with the Tribe, BPA and the USFWS, determines that bull trout passage is feasible, the Corps agrees to seek appropriations as described in Section II.C.1.

#### **(3) Interim Bull Trout Passage Actions**

The Corps, BPA, and the Tribe share interest in providing temporary upstream passage for bull trout, if practicable, and obtaining information to support future management decisions while a long-term passage facility is evaluated, as described in annual Action Plans. As preliminary measures to support these interim actions, BPA agrees to provide funding for Projects 13 and 14 identified in Attachment B. The Parties are committed to developing and prioritizing additional interim passage actions for the benefit of bull trout as a permanent passage solution for bull trout is evaluated. High priority interim actions will be implemented as agreed upon by the Corps, BPA, and the Tribe in future annual Action Plans.

### C.2. Collaboration and Coordination Process & Products

The process set forth below is intended to provide a framework to improve collaboration between the Corps, BPA, and the Tribe, and includes operational planning for Albeni Falls Dam.

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### **C.2.a. Albeni Falls Annual Operations Planning**

The Operating Project Manager (“OPM”) at Albeni Falls Dam, or authorized representative, will meet as needed with the Tribe to discuss general operational issues. These meetings will normally be scheduled on a quarterly basis and will include the Corps (Northwestern Division Chief of the Columbia Basin Reservoir Control Center and representation from the Seattle District Water Management) and BPA. The Parties’ intent for these meetings is to discuss water management issues and operations with potential impacts on fish, wildlife, and water temperature in the Pend Oreille River.

These joint meetings will be used to develop the proposed annual water management operations for Albeni Falls Dam for inclusion in the FCRPS annual Water Management Plan (“WMP”) and seasonal updates. The process of making a recommendation to conduct a post-Labor Day experimental release will begin approximately one month before Labor Day when the Policy Team will meet to discuss whether forecasted weather and water conditions are likely to trigger the need for such a release. If the Parties determine that implementation of the experimental operation is warranted, the Policy Team will task the technical team to develop a System Operations Request (“SOR”), which after review by the Policy Team will be submitted to the Technical Management Team by the Kalispel Tribe for discussion among sovereigns. If the information presented to and discussed by the Technical Management Team provides a reasonable basis to conclude that an early post-Labor Day release may be biologically beneficial to bull trout and other aquatic species, the Corps will conduct such a release absent conflicting ESA obligations or unforeseeable and extraordinary circumstances.

### **C.2.b. Development of an Action Plan with Annual Updates to Address Bull Trout Passage, Water Temperature Related Activities, and Other Coordinated Actions**

The Corps, BPA, and the Tribe will collaborate on the development of an Action Plan (“AP”) for the Albeni Falls project to address bull trout passage, water temperature related activities, and other activities that could benefit from planned coordination. The Action Plan will be updated annually and will:

- Document actions completed in the preceding fiscal year (October 1 – September 30), and the status of any planned but uncompleted actions (including the explanation for any delays or plan changes);
- Identify specific priority actions—including a schedule of tasks, key milestones, and necessary funding requests—to be taken in the upcoming fiscal year based on the status of available funding; and
- Identify projected key actions, milestones, and funding needs for future fiscal years.

The AP for fiscal year (“FY”) 2012 is set forth in Attachment C to this Agreement. The Corps, BPA, and the Tribe will collaborate to update the AP by August 31 of each year. The same process will be followed for each successive fiscal year for the duration of this Agreement or until the Tribe, BPA, and the Corps agree that the process is no longer

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necessary. The AP is a “living document” and may be modified using adaptive management principles as needed. The Tribe understands that modification of planned implementation schedules may be required and will not object to scheduling changes that are reasonably necessary and timely conveyed as part of the routine coordination process.

### **C.2.c. Annual Planning Meeting and Specific Coordination Meetings**

Appropriate policy and technical staff from the Corps, BPA, and the Tribe will meet at least once per year in the summer to address issues and progress, and provide guidance to staff for the development of the following year’s update of the AP and annual WMP, as further described in Attachment C, Section III. Included in the annual meeting will be a review of the Parties’ coordinated efforts to date under the current AP, which will inform action items for the upcoming fiscal year’s AP. The meeting will be scheduled to provide sufficient time for the Parties to arrange any follow-up discussions or meetings that are necessary to timely finalize the AP. Annual planning meetings may be cancelled by mutual agreement.

The Corps, BPA, and the Tribe will also meet annually in February/March to address funding processes consistent with the Corps’ budgetary guidance to provide continuity of project development of and/or implementation of agreed upon activities and projects pursuant to the MOA.

Meetings will be called as needed to address the status of the actions in the AP. These meetings may address changes in scope, schedule, or costs, or to ensure Parties are informed on progress.

Any party may request a meeting to discuss Albeni Falls operations or AP actions of concern. Once such a discussion/meeting is requested, the Corps will take the lead role to timely arrange a discussion/meeting and include appropriate policy and technical staff.

### **C.3. Proposed Wintertime Operational Changes**

The Corps, BPA, and the Tribe collaborated to address operations to increase wintertime flexibility for power operations (“**FWPO**”) at Albeni Falls Dam. In addition to the forbearance provisions in Section IV.A.2, the Tribe will not support or participate in any administrative or legal challenges to the Corps’ and BPA’s Albeni Falls Dam Flexible Winter Operation Final Environmental Assessment (Oct. 2011), or the flexible winter power operations, provided that the Corps and BPA abide by the terms of this MOA, including the collaboration process.

BPA and the Tribe will jointly support drafting Lake Pend Oreille to elevation 2055 feet in the fall of 2012 and to elevation 2051 feet in the fall of 2013. After 2013, BPA, the Corps, and the Tribe will discuss appropriate elevation levels based on the latest information available, including study results and the provisions of any new bull trout FCRPS BiOps.

## **D. Emergency Operations for non-ESA-listed Fish**

The Action Agencies agree to take reasonable actions to aid non-ESA-listed native fish during brief periods of time due to unexpected equipment failures or other conditions and when

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significant detrimental biological effects are demonstrated. Where there is a conflict in such operations, operations for ESA-listed fish will take priority.

### **III. BPA HABITAT AND HATCHERY COMMITMENTS**

#### **A. BPA Funding for Habitat**

##### **A.1. General Principles**

- BPA will provide expense and capital funding for habitat projects identified in Attachment A. BPA's funding commitment identified in Attachment A is subject to the adjustments noted in Sections III.E and III.F. BPA may also provide additional funding through the process set forth in Section III.A.3 below.
- Habitat projects funded under this Agreement are linked to biological benefits based on limiting factors for ESA-listed fish; to limiting factors identified in the relevant subbasin plan as to FCRPS impacts to non-ESA-listed fish; or to biological benefits addressing the impacts to wildlife (addressing wildlife loss assessments and the habitat unit (“**HU**”) losses identified in table C-4 of the Council's 2009 Fish and Wildlife Program). See Attachment B.
- For wildlife habitat acquisitions, the Parties agree to a “fixed credit” approach: in exchange for the \$2.5 million capital funding commitment from BPA (Project No. 1, Attachment A), the Kalispel Tribe shall acquire wildlife habitat providing a minimum of 2,869 HUs over the term of this Agreement towards HU losses identified for Albeni Falls Dam. See Project No. 1, Attachment B. Should BPA resolve, through settlement, the remaining construction and inundation wildlife losses for the Albeni Falls project, or should BPA agree to an increase in the mitigation for remaining construction and inundation wildlife losses for Albeni Falls, BPA and the Tribe will negotiate whether wildlife funding to the Tribe in addition to this MOA commitment is needed.
- Projects funded under this Agreement are consistent with recovery plans and subbasin plans now included in the Council's Fish and Wildlife Program. More specific linkages will be documented as a function of the BPA contracting process.
- BPA supports the Tribe's use of non-native fish for resident fish substitution with appropriate safeguards to avoid impacts to native fish.
- Projects may be modified by agreement over time based on biological priorities, feasibility, science review comments, or accountability for results.

##### **A.2. Types of Projects**

BPA is committing to funding a suite of projects and activities that are summarized in Attachment A and further described in Attachment B. The projects or actions are all designed to address fish and wildlife impacted by the FCRPS in support of the NOAA and USFWS FCRPS

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BiOps and the Council’s Fish and Wildlife Program implementation in Washington and Idaho, including actions designed to benefit bull trout.

### **A.3. Operational Impacts**

The Parties have not reached agreement on the extent of the impact of ongoing FCRPS operations on wildlife and resident fish species (as differentiated from impacts of the construction of the FCRPS, including inundation), or the degree to which any such impacts have already been mitigated. Similarly, the Parties have not reached agreement on the need for, or the efficacy of “loss assessments” as those have historically been done to identify mitigation approaches funded by BPA. The Parties have nonetheless agreed to address the initial steps toward resolving these matters through this Agreement.

Specifically, BPA has agreed to fund work by the Tribe (see Project Nos. 3 and 11 as described in Attachments A and B), or through other means, to identify and analyze the impacts of FCRPS operations on wildlife and resident fish, taking into account prior and ongoing mitigation. If, as a result of those projects or any other project performed in conjunction with this MOA, or through information generated during the re-consultation process described in Section II.B above, or collaboration as described in Section II.C above, BPA and the Tribe agree, (or if, as needed, reach agreement following dispute resolution), that there are operational impacts to wildlife, resident fish, or both from the FCRPS that are not already addressed by past and ongoing mitigation, then BPA and the Tribe will work with the State of Idaho to negotiate a longer-term strategy, which may include permanent settlement, for wildlife and/or resident fish mitigation. Because the outcome of these identification projects is uncertain—there may or may not be additional mitigation needs—BPA and the Tribe have not identified a funding amount, except as described in Attachments A and B.

## **B. BPA Funding for Hatchery Actions**

### **B.1. General Principles**

- BPA’s funding will be in addition to and not replace funding for hatcheries provided by other entities, including but not limited to funding provided by Congress pursuant to the Mitchell Act, 16 U.S.C. §§ 755-757.
- If the hatchery action identified in Attachment A is not able to be implemented as originally proposed due to circumstances beyond the control of the Parties, the Action Agencies are not obligated to fund a replacement or alternative project. Unused hatchery funds may be shifted to non-hatchery projects only upon BPA and the Tribe’s agreement.

### **B.2. Hatchery Actions**

Although the Parties have not reached agreement on the extent of the impact of the FCRPS on bull trout and cutthroat trout populations, the Parties agree that a conservation hatchery facility to assist with the restoration of genetically distinct populations of bull trout and cutthroat trout to multiple streams in Washington and Idaho should be constructed in the future to address FCRPS

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impacts. The conservation aquaculture facility could provide a place where genetically distinct segments of the bull trout and cutthroat trout populations from numerous streams and tributaries can be maintained. While those populations were being reared and held in the conservation facility, non-indigenous species of trout and other fish that directly compete and hybridize with native fish in streams (e.g., brook trout and northern pike) could be eliminated from appropriate streams and tributaries. The genetically distinct bull trout and cutthroat trout populations could then be replanted to their stream or tributary of origin from the conservation facility. Under this Agreement, BPA agrees to be a partner in the planning and development of the conservation aquaculture facility provided that the Tribe will take the lead in developing the proposal, and coordinating with all the appropriate state (both Washington and Idaho), federal and tribal entities that have regulatory authority or that would be affected by this proposal, and that appropriate cost-share from other entities will be secured. As described further in Attachment B, the Tribe may use some of the funding committed by BPA under this Agreement in Project No. 12 to support the planning for the conservation facility.

BPA is making no commitments of capital funding for the hatchery at this time; such funding will be developed depending on the outcome of planning for the hatchery and appropriate cost-share partners committing funding as well.

### **C. General Provisions for All BPA-Funded Projects**

#### **C.1. All BPA-funded Projects Pursuant to this Agreement Shall:**

- Be consistent with the Council's Program (including subbasin plans), as amended, and otherwise compliant with the NPA's science and other review processes; applicable ESA recovery plans; and applicable data management protocols adopted by the Action Agencies;
- For BPA-funded commitments, be consistent with BPA's then applicable policies, including but not limited to BPA's in lieu policy and BPA's capitalization policy;
- For BPA-funded commitments, report results annually (including ongoing agreed upon monitoring and evaluation) via PISCES and/or other appropriate databases; and
- Remain in substantive compliance with any applicable project contract terms.

#### **C.2. In addition, for Nonhatchery Projects Identified as Providing Benefits to ESA-listed Fish, the Tribe Shall:**

- Provide estimated habitat quality improvement and survival benefits from the project to a population or populations of listed species based on key limiting factors;
- Identify these benefits based on expert determination; and
- Support and defend these estimates of habitat improvement and survival benefits with scientific, policy, and legal arguments.



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### **C.3. In Addition, for Hatchery Projects, the Tribe Shall, Prior to Capital Funding:**

- Identify the biological benefits associated with a hatchery project based on expert determination and support and defend these estimates of biological benefits;
- Obtain a NOAA or USFWS determination (as appropriate) that the hatchery project will not impede and where possible will contribute to recovery; and
- Secure or assist in securing all necessary permits for hatchery construction and operation.

**C.4.** BPA and the Tribe will coordinate their RM&E projects with each other and with regional RM&E processes (particularly those needed to ensure consistency with the NOAA FCRPS BiOps), as appropriate and agreed to between BPA and the Tribe.

**C.5.** For BPA-funded actions on federal lands, the Tribe will consult with the federal land managers and obtain necessary permits and approvals.

### **D. Northwest Power Act Coordination for BPA-funded Projects**

**D.1.** BPA and the Tribe agree that the BPA funding commitments in this Agreement are commitments of the Bonneville Fund for implementation of projects for the duration of the Agreement. The Parties believe that this Agreement and the specific projects are consistent with the Council's Program.

**D.2.** BPA and the Tribe will work with the Council to streamline and consolidate Independent Scientific Review Panel (“ISRP”) project reviews by recommending that the ISRP (1) review projects collectively on a subbasin scale; (2) focus reviews for ongoing or longer term projects on future improvements/priorities; and (3) unless there is a significant scope change since the last ISRP review, minimize or abbreviate re-review of ongoing projects.

**D.3.** BPA and the Tribe will consider reasonable adjustments to non-hatchery projects based on ISRP and Council recommendations. The decision on whether or not to make such reasonable adjustments will require agreement of the Tribe and BPA. If the reasonable adjustment results in a reduction of a project budget, the Tribe and BPA will select another project to use the funds equal to the amount of the reduction. If the Tribe and BPA cannot agree on whether a recommended adjustment should be made, a replacement project that meets the requirements of this Agreement will be identified. In any event, BPA's financial commitment to non-hatchery projects will not be reduced to an aggregate level below that specified in this Agreement so long as a replacement project that meets the requirement of this Agreement could be identified. See Section III.E, below.

**D.4.** BPA funding for any new hatchery projects is subject to ISRP and Council 3-step review processes, recognizing that the ultimate decision to implement the projects is BPA's, subject to the terms of this Agreement. Capital funding for any new hatchery project is subject to these review processes. BPA and the Tribe will consider reasonable adjustments to BPA-funded

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hatchery projects based on ISRP and Council recommendations. The decision on whether or not to make such reasonable adjustments will require agreement of the Tribe and BPA.

### **E. Replacement Projects and Adaptive Management for BPA-funded Projects**

#### **E.1. General Principles**

- This Section does not apply to hatchery projects.
- BPA and the Tribe agree that a BPA-funded project identified in this Agreement may not ultimately be implemented or completed due to a variety of possible factors, including but not limited to:
  - Problems arising during regulatory compliance (e.g., ESA consultation, NEPA, NHPA review, CWA permit compliance, etc.);
  - The project does not meet BPA's in lieu policy or does not meet BPA's capital policy;
  - New information regarding the biological benefits of the project (e.g., new information indicates a different implementation action is of higher priority, or monitoring or evaluation indicates the project is not producing its anticipated benefits);
  - Changed circumstances (e.g., completion of the original project or inability to implement the project due to environmental conditions); or
  - Substantive non-compliance with the implementing contract.
- Should a project not be implemented due to one or more of the above factors, or for any similar reason not specified above, BPA and the Tribe will promptly negotiate a replacement project.

#### **E.2. Replacement Projects**

- A replacement project should be the same or similar to the one it replaces in terms of target species, limiting factor, mitigation approach, geographic area and/or subbasin, and biological benefits.
- A replacement project will not require additional Council or ISRP review if the original project has been reviewed.
- A replacement project should have the same or similar planning budget as the one it replaces (less any expenditures made for the original project). Such budget must address

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carry-forward funding whose amount and calculation will be subject to the Parties' mutual agreement.

### **E.3. Adaptive Management**

In addition to project-specific adaptation described above, BPA and the Tribe may agree to adaptively manage this shared implementation portfolio on a more programmatic scale based on new information or changed circumstances.

## **F. Inflation, Ramp Up, Planning vs. Actuals, Carry-over for BPA-funded Projects**

### **F.1. Inflation**

Beginning in fiscal year 2013, BPA will provide an annual inflation adjustment of 2.5 percent. In implementing this provision, BPA will add the inflation adjustment, compounded, to expense budgets beginning in 2013, but will not subsequently adjust project budgets as the schedule of that work changes.

### **F.2. Expense Planning vs. Actuals, and Project-Year Budget**

**F.2.a.** BPA will plan to contract at the full amounts described in this Agreement; however, due to a variety of factors outside BPA's control, BPA's actual expenditures may be less. (Historically, the average difference between BPA's planned expenditures for implementing the expense component of its Fish and Wildlife Program and BPA's actual spending is about 7 percent; that is, BPA plans to expend 100 dollars, but it is invoiced and pays 93 dollars). When under-spending occurs, funding can be made available in other years and for other projects by mutual agreement per Section III.F.3, below. If total BPA expense spending under this Agreement is less than 93 percent of the planned amount in any one year, BPA and the Tribe will meet to discuss possible actions, one of which shall be timely implemented, to remove the impediments to achieving the Agreement's full implementation spending.

**F.2.b.** BPA's financial commitments and project budgets identified in Attachment A are described in fiscal-year terms, but BPA fish and wildlife program contracts are not necessarily aligned to the fiscal year. As a result, the expense budgets in Attachment A will be interpreted as project-year budgets. This means that the project (as implemented through a BPA-issued contract or contracts) can start anytime during the fiscal year (Sept. 1 – Oct. 30) and use that project-year budget for the full implementation period (usually one year).

### **F.3. Budget Management**

The Tribe may request an adjustment of the project-year budget for any individual project so long as the Agreement-level planning budget—the roll up of the individual project-year budgets—does not exceed 120% of the original planning budgets after the inflation adjustment.

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Transfers of budgets between projects may be allowed through mutual agreement so long as the transfer is consistent with the Agreement-level budget cap (described in the above paragraph), and BPA and the Tribe mutually agree on the revised focus. (BPA will not likely agree to a budget transfer that moves dollars away from habitat work or other on-the-ground work.)

If the Tribe is able to complete work below a project budget, leaving obligated funds for a project unspent when the contract is closed, those funds will be made available to the Tribe for re-allocation if mutually agreed by BPA. Through mutual agreement those unspent funds may be rescheduled to the same project or transferred to another Agreement project so long as the adjustment is consistent with the Agreement-level budget cap.

### **F.4. Costs of environmental and regulatory reviews**

In order to implement the projects identified in this Agreement, BPA and/or the Tribe will potentially need to undertake a variety of environmental and regulatory reviews, including, but not limited to those under NEPA, the NHPA, the ESA, and the CWA. Unless otherwise agreed, the costs of these review processes will be taken out of the funding commitments of this Agreement, regardless of whether the Tribe or BPA undertakes the work. Thus, for example, if an Environmental Assessment or an Environmental Impact Statement under NEPA is needed for one or more projects, the costs of that work will be subtracted from the relevant project budget under this MOA. The Parties agree to coordinate in advance on budgeting for these environmental and regulatory reviews. BPA will generally be supportive of requests by the Tribe to shift project funding from one project to another as may be necessary to provide for unexpected costs of environmental and regulatory reviews.

## **IV. FORBEARANCE, WITHDRAWAL, AND DISPUTE RESOLUTION**

### **A. Effects on Litigation**

**A.1.** The Parties will discuss the appropriate means of alerting the district court in *NWF v. NMFS* of this Agreement (if needed) and will undertake any agreed-upon approach within 14 calendar days of the effective date of this Agreement.

**A.2.** In consideration of the long-term commitments for funding and implementation activities to support protection and recovery of, and other benefits for, fish and wildlife affected by the FCRPS and Upper Snake Projects set out in this Agreement, the Tribe covenants<sup>3</sup> that during the term of this Agreement:

- a) The Tribe will not initiate, intervene in, or support in any manner ESA, NPA, CWA (including but not limited to causes of action premised on Section 401 of the CWA), or

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<sup>3</sup> These commitments apply to the Tribe, its staff, and any persons hired or volunteering for the Tribe when acting in the name of or on behalf of the Tribe, any representative or organization under the Tribe's guidance or control, and any person or entity when acting as an agent for the Tribe, and to participation in all forums.

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Administrative Procedure Act (“**APA**”) suits against the Action Agencies or NOAA or the USFWS regarding the legal sufficiency of the NOAA FCRPS BiOps, Upper Snake BiOp, the USFWS FCRPS BiOp, the 2008 Columbia Basin Fish Accords, this Agreement, and/or conforming implementing decision documents, including Records of Decision (“**RODs**”), absent consent of all federal defendants.

- b) Provided that the terms and conditions of the BiOps, and modifications to any of the BiOps through consultation, including but not limited to remanded or reinitiated consultation, Columbia Basin Fish Accords, this Agreement, and conforming implementing decision documents are complied with by the Action Agencies, the Tribe will not initiate, intervene in, or support in any manner ESA, NPA, CWA (including but not limited to causes of action premised on Section 401 of the CWA) or APA suits against the Action Agencies, NOAA, or the USFWS regarding the effects on fish resources or water quality resulting from the operations or existence of the FCRPS and Upper Snake Projects that are specifically addressed in the NOAA FCRPS BiOps, Upper Snake BiOp, the 2008 Columbia Basin Fish Accords, this Agreement, the USFWS FCRPS BiOp, and/or conforming implementing decision documents, absent consent of all federal defendants. Water quality for purposes of this provision includes only water temperature and total dissolved gas (“**TDG**”) requirements and therefore excludes all other matters, such as (by way of illustration and not limitation) the Corps’ program under 33 U.S.C. § 1344 and toxics clean up regulation. Nothing in this Agreement shall preclude the Tribe from enforcing the provisions of the tribal water quality codes, to the extent permitted by federal law, with respect to any effect from the operation of the FCRPS and Upper Snake Projects, except effects on TDG or water temperature when an FCRPS project is operated consistently with the NOAA FCRPS and Upper Snake BiOps, the USFWS FCRPS BiOp, and to the maximum extent practicable, any total maximum daily load (“**TMDL**”) applicable to the Pend Oreille River and its tributaries, and this Agreement. Nothing in this Agreement shall preclude the Tribe from participating in ongoing processes regarding TMDLs for temperature or TDG, nor does it preclude continued discussions about temperature and TDG with the Action Agencies, but the Tribe is agreeing that during the term of this Agreement, it will not take action against the Action Agencies for temperature or TDG issues as to the FCRPS, except as permitted by this Section. In recognition of the value of the MOA in fostering a cooperative and collaborative relationship, the Tribe agrees that before initiating any enforcement action concerning tribal water quality codes, it will confer with the Corps and BPA to seek alternatives for resolution.
- c) The Tribe’s participation in ongoing and future BPA rate proceedings (ratemaking, approval, or review) will be consistent with the terms of this Agreement.
- d) The Tribe shall not advocate against, either directly or through parties not subject to the Agreement, the adequacy of the NOAA FCRPS and Upper Snake BiOps, the USFWS FCRPS BiOp, the Action Agencies’ implementation of the BiOps, or this Agreement except as otherwise provided in this Agreement. Nothing in this Agreement shall preclude the Tribe from discussing the NOAA FCRPS, Upper Snake, and USFWS FCRPS BiOps with the Action Agencies, and indeed, if the Tribe has concerns about the

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adequacy of or implementation of these BiOps, the Tribe shall discuss these matters with the Action Agencies in accordance with the Good Faith provisions of Section IV.D, below.

- e) The Tribe will not directly or indirectly advocate or support the implementation of FCRPS dam breaching as part of this Agreement or for the duration of this Agreement.
- f) The Tribe will not directly or indirectly support third-party efforts to challenge the adequacy of the BiOps, this Agreement, or the Action Agencies' efforts to implement them, except as otherwise provided in this Agreement.

### **B. Affirmation of Adequacy**

**B.1.** Provided that the Action Agencies fulfill their funding commitments under this Agreement, for the term of this Agreement, the Parties agree the actions committed to in this Agreement along with the actions committed to by the Action Agencies in the NOAA FCRPS and Upper Snake BiOps and the USFWS FCRPS BiOp, including modifications to any of the BiOps through consultation, including but not limited to remanded or reinitiated consultation, are an adequate combined response of these entities to address the government's duties to mitigate for the FCRPS effects under applicable environmental laws and regulations for the duration of the BiOps. This includes requirements for:

- Conserving currently listed salmon and steelhead, and bull trout, including avoiding jeopardy and adverse modification of currently designated critical habitat under the ESA;
- Protection, mitigation, enhancement and equitable treatment of fish and wildlife under the NPA; and
- Consistency with the CWA related to water temperature and TDG responsibilities for FCRPS dams to the extent consistent with the NOAA FCRPS and Upper Snake BiOps and the USFWS FCRPS BiOp.

**B.2.** The Tribe agrees that the Action Agencies' commitments under the 2008 Columbia Basin Fish Accords for lamprey actions are adequate for the duration of this Agreement such that the Tribe will not petition to list lamprey or support third party efforts to list lamprey as threatened or endangered pursuant to the ESA.

**B.3.** Any obligation the Action Agencies may have to mitigate for the effect of the FCRPS Projects or operations on cultural resources, however, is not addressed in this MOA, and therefore this MOA does not address the adequacy or lack thereof of any such mitigation efforts.

**B.4.** The Tribe's determination of adequacy under applicable law is premised on several important assumptions and understandings with which the federal Parties to this MOA concur:

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- The specific actions identified in this Agreement, including those appearing in any Attachment thereto, are carried out and/or funding for such actions is provided by the federal Parties in a timely manner;
- Other actions not specifically identified in this Agreement, but committed to in the Action Agencies' decision documents adopting the actions called for in the NOAA FCRPS BiOps and USFWS FCRPS BiOp, and their respective Incidental Take Statements as they relate to the Pend Oreille River and its tributaries, are complied with and carried out in coordination with the Tribe following the provisions of Section II.C;
- The biological performance and status of the species affected by the development and operation of the FCRPS and Upper Snake hydro projects are diligently and comprehensively monitored and analyzed, and reported to the Tribe and others as provided in those BiOps; and
- Adaptive management will be used as described in Section 2.1 of the Action Agencies' FCRPS BA and incorporated into the 2010 Supp. BiOp to ensure achievement of performance objectives for the FCRPS. See also Section II.B.2 of this MOA.

### **C. Northwest Power and Conservation Council Program Amendment Process and Other Provisions**

**C.1.** During the term of the Agreement, comments or recommendations for Council Program amendments that the Tribe or Action Agencies submit to the Council shall be consistent with and intended to effectuate this Agreement.

**C.2.** If third parties recommend an amendment to the Program, or the Council adopts an amendment based upon its own recommendations, that any Party believes is contrary to this Agreement, the Party is not precluded by the terms of this Agreement from asserting any arguments it may have as to whether such an amendment is lawful or unlawful under the NPA, or any other law, provided in so doing they act consistent with the terms of this Agreement.

### **D. Good Faith Implementation and Support**

Best effort good-faith implementation and support of this Agreement is the general duty to which all Parties agree to be bound. Although neither the Action Agencies nor the Tribe are relinquishing their respective authorities through this Agreement, they commit to best efforts to sit down with each other prior to making decisions in implementation of this Agreement. The Parties understand that from time to time questions or concerns may arise regarding a Party's compliance with the terms of this Agreement. In furtherance of the continuing duty of good faith, each Party agrees that the following specific actions or efforts will be carried out:

**D.1.** On a continuing basis, each Party will take steps to ensure that all levels of its government/institution are made aware of the existence of this Agreement and the specific commitments and obligations herein, and emphasize the importance of meeting them;

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**D.2.** Each Party will designate a person to be initially and chiefly responsible for coordinating internal questions regarding compliance with the Agreement;

**D.3.** Each Party will make best efforts to coordinate with other Parties prior to taking any action that could reasonably be interpreted as inconsistent with any part of this Agreement. To assist in this, the Parties will designate initial contact points. The formality and nature of the coordination will likely vary depending on circumstances. The initial contact points are initially charged with attempting to agree on what form of coordination is required. In some instances, the contact between initial contact points may suffice for the coordination, while in others, they may need to recommend additional steps. The Parties agree that coordination should be as informal and with the least amount of process necessary to ensure that the Parties are fulfilling the good-faith obligation to implement and support the Agreement.

**D.4.** If a Party believes that another Party has taken action that is contrary to the terms of the Agreement, or may take such action, it has the option of raising a point of concern with other Parties and asking for coordination to clarify or redress the matter. The Parties will endeavor to agree upon any actions that may be required to redress the point of concern. If after raising a point of concern and after coordinating, the Parties are unable to agree that the matter has been satisfactorily resolved, any Party may take remedial actions as it deems appropriate, so long as those remedial actions do not violate the terms of the Agreement.

### **E. Changed Circumstances, Renegotiation/Modification, Withdrawal**

**E.1.** The Parties acknowledge that NOAA Fisheries has issued a BiOp for the FCRPS as of May 5, 2008, and Supplemental BiOp on May 20, 2010, and that there is litigation regarding these BiOps. On August 2, 2011, after this MOA was largely negotiated and vetted publicly, the District Court of Oregon issued an opinion and order upholding these BiOps through 2013, and remanded them to NOAA to issue a new or supplemental BiOp on January 1, 2014. The Action Agencies shall apprise the Tribe of the development of the BiOp resulting from this remand. The Parties acknowledge that Section E.2 below is in effect once the future BiOp (or BiOp supplement) is issued such that this Agreement remains in force and the Parties will seek to preserve this Agreement. The Parties will meet within 60 days after issuance of the resulting BiOp (or BiOp supplement) to determine any appropriate steps, such as modifying the definition of “NOAA FCRPS BiOps” for this Agreement to expressly incorporate the resulting BiOp (or BiOp supplement), or other steps consistent with the terms of this Agreement.

**E.2.** If any court, regardless of appeal, finds that any of the NOAA, Upper Snake, or USFWS FCRPS BiOps or agency action is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, and subsequently remands such a BiOp to NOAA Fisheries or the USFWS, this Agreement shall remain in force, and the Parties will seek to preserve this Agreement by meeting promptly to determine the appropriate response as described below:

- a) In the event that a portion(s) of this Agreement is in direct conflict with the court order or resulting BiOp, the Parties shall meet and agree on an appropriate amendment to that Section, or, if such amendment is not possible under the terms of the court order or resulting BiOp, then a substitute provision shall be negotiated by the Parties.



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- b) If any court-ordered FCRPS operations or resulting BiOp require additional actions that are either financially material to an Action Agency or that materially constrain the Corps or Reclamation from meeting FCRPS purposes, Section IV.E.3 shall apply.
- c) The Parties, as applicable, will participate in any court-ordered process or remand consultation in concert with Sections IV.D and IV.E.
- d) The Parties intend that determinations of materiality will only be made in cases of great consequence.

**E.3.** In the event of the occurrence of any of the material effects as described in Section IV.E.2, or in the event that the USFWS issues a new bull trout BiOp that requires additional actions in relation to Albeni Falls Dam that are either financially material to an Action Agency or that materially constrain the Corps from meeting FCRPS purposes and the additional actions required by the USFWS were recommended by or supported by the Tribe, or in the event of material non-compliance with the Agreement not resolved by dispute resolution, or in the event of any material dispute that is not resolved by dispute resolution (for example, in the event of a dispute between an Action Agency and the Tribe affecting the Tribe's rights or interests regarding protection of native fish, their habitat, or water quality in the Pend Oreille River system that is not resolved by dispute resolution), the affected Party or Parties shall notify the other Parties immediately and identify why the event is considered material. The Parties shall utilize dispute resolution if there is a disagreement as to whether the event is material. In addition, prior to any withdrawal, the Parties shall first make a good faith effort to renegotiate agreeable modifications to the Agreement. If renegotiation is not successful, the affected Party may notify the other Parties in writing of its intent to withdraw by a date certain. If renegotiation is not successful, at the time the withdrawal is effective, all funding commitments and/or other covenants made by the withdrawing Party cease, and the withdrawing Party shall have no further rights or obligations pursuant to the Agreement. A withdrawing Party reserves any existing legal rights under applicable statutes, including all arguments and defenses, and this Agreement cannot be used as an admission or evidence in support of or against any such argument or defense.

**E.4.** The provisions of this Agreement authorizing renegotiation, dispute resolution, and withdrawal provide the sole remedies available to the Parties for remedying changed circumstances or disputes arising out of or relating to implementation of this Agreement.

**E.5.** If one Party withdraws from the Agreement, any other Party has the option to withdraw as well, subject to dispute resolution.

**E.6.** Notwithstanding Section IV.E.3, in the event of withdrawal, BPA will continue providing funding for projects necessary for support of NOAA FCRPS BiOps commitments (as determined by the Action Agencies), and may provide funding for other ongoing projects or programs that the Parties agree are important to continue.

## **F. Dispute Resolution**

### **F.1. Negotiation**

**F.1.a.** The Parties shall attempt in good faith to resolve any dispute arising out of or relating to the terms and conditions or the implementation of this Agreement in accordance with this Section and without resort to administrative, judicial, or other formal dispute resolution procedures.<sup>4</sup> The purpose of this Section IV.F.1 is to provide the Parties an opportunity to fully and candidly discuss and resolve disputes without the expense, risk, and delay of a formal dispute resolution.

**F.1.b.** If the Parties are unable to resolve the dispute through informal dispute resolution, then the dispute shall be elevated to negotiating between executives and/or officials who have authority to settle the controversy and who are at a higher level of management than the person with direct responsibility for administration of this Agreement. To elevate, any Party shall give any other Party written notice of any such dispute. All reasonable requests for information made by one Party to the other will be honored, with the Action Agencies treating “reasonable” within the context of what would be released under the Freedom of Information Act.

**F.1.c.** In the event a material dispute or dispute over material non-compliance with the Agreement has not been resolved by negotiation, the affected Party may withdraw, without further renegotiation, in accordance with Section IV.E.3.

### **F.2. Mediation**

In the event the dispute has not been resolved by negotiation as provided herein, the disputing Parties, if mutually agreed, may participate in mediation, using an agreed upon mediator. To the extent that the disputing Parties seeking mediation do not already include all Parties to this Agreement, the disputing Parties shall notify the other Parties to this Agreement of the mediation. The mediator will not render a decision, but will assist the disputing Parties in reaching a mutually satisfactory agreement. The disputing Parties agree to share equally the costs of the mediation.

## **G. Modification**

The Parties by agreement may modify the terms of this Agreement. Any such modification shall be in writing signed by all Parties.

## **H. Consistency with Trust and Reserved Rights**

Nothing in this Agreement is intended to nor shall in any way abridge, abrogate, or resolve any rights reserved to the Kalispel Tribe by statute, Executive Order, or other federal law. The

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<sup>4</sup> “Relating to the terms and conditions or the implementation of this Agreement” excludes disputes that arise in terms of implementation of an intergovernmental contract issued to fulfill this Agreement, which shall be governed by the disputes provisions of that contract.

## **KALISPEL TRIBE – ACTION AGENCY MOA**

Parties agree that, for the term of this Agreement, this Agreement as it pertains to effects of the FCRPS and Upper Snake Projects is consistent with the federal reserved rights of the Kalispel Tribe and the United States' trust obligation to the Tribe as long as the commitments herein are implemented by the Action Agencies in good faith. This Agreement does not create an independent trust obligation. The Tribe specifically represents and warrants that no approval of this Agreement by the Secretary of the Interior or the Bureau of Indian Affairs or any other federal agency or official is required in order for the Tribe to execute this Agreement or for this Agreement to be effective and binding upon the Tribe.

### **V. MISCELLANEOUS PROVISIONS**

#### **A. Term of Agreement**

The term of this Agreement will extend from its effective date through September 30, 2022. The Parties agree to meet no later than September 30, 2021, to discuss wind up of commitments, or, if appropriate, renewal or extension of this Agreement.

#### **B. Applicable Law**

All activities undertaken pursuant to this Agreement must be in compliance with all applicable laws and regulations. No provision of this Agreement will be interpreted or constitute a commitment or requirement that the Action Agencies take action in contravention of law, including the APA, ESA, CWA, NEPA, Federal Advisory Committee Act, Information Quality Act, or any other procedural or substantive law or regulation. Federal law shall govern the implementation of this Agreement and any action, whether mediated or litigated or not.

#### **C. Authority**

Each Party to this Agreement represents and acknowledges that it has full legal authority to execute this Agreement.

#### **D. Effective Date & Counterparts**

The effective date of this Agreement shall be the date of execution by the last Party to provide an authorized signature to this Agreement. This Agreement may be executed in counterparts, each of which is deemed to be an executed original even if all signatures do not appear on the same counterpart. Facsimile and photo copies of this Agreement will have the same force and effect as an original.

#### **E. Binding Effect**

This Agreement shall be binding on the Parties and their assigns and successors.

## **F. Third Party Beneficiaries**

No third party beneficiaries are intended by this Agreement.

## **G. Integration**

All previous communications between the Parties, either verbal or written, with reference to the terms of this Agreement are superseded, and this Agreement duly accepted and approved constitutes the entire Agreement between the Parties.

## **H. Waiver, Force Majeure, Availability of Funds**

**H.1.** The failure of any Party to require strict performance of any provision of this Agreement or a Party's waiver of performance shall not be a waiver of any future performance of or a Party's right to require strict performance in the future.

**H.2.** No Party shall be required to perform where such performance is not possible due to any cause beyond its control. This may include, but is not limited to fire, flood, terrorism, strike or other labor disruption, act of God, or riot. The Party whose performance is affected by a *force majeure* will notify the other Parties as soon as practicable of its inability to perform, and will make all reasonable efforts to promptly resume performance once the *force majeure* is eliminated. If the *force majeure* cannot be eliminated or addressed, any Party affected by the failure of performance caused by the *force majeure* may withdraw pursuant to Section IV.E.3.

**H.3.** The actions of the Corps and Reclamation set forth in this Agreement are subject to the availability of appropriated funds. Nothing in this Agreement shall be construed to require the obligation or disbursement of funds in violation of the Anti-Deficiency Act.

## **I. Reservation of Rights**

This Agreement does not address or resolve the Tribe's claims and concerns relating to: (1) harvest, harvest rights, or harvest allocation of fish and wildlife resources unrelated to the FCRPS and Upper Snake projects; (2) the Tribe's federally reserved or other water rights to the Pend Oreille River and its tributaries, including rights for instream flows; (3) designation or modification of critical habitat for bull trout by the USFWS subject to Section II.B and IV.E.3; (4) modification of any of the terms or conditions of the listing of bull trout as endangered or threatened by the USFWS subject to Sections II.B and IV.E.3; (5) the impact of the FCRPS on cultural resources, which is addressed through the Action Agencies' joint FCRPS cultural resource program and its governing consultations and agreements with the Tribe; and (6) any action or inaction by any agency or department of the United States other than the Action Agencies that are Parties to this Agreement or those agencies or departments issuing the NOAA FCRPS, Upper Snake, and USFWS FCRPS BiOps as to those BiOps. Except as expressly addressed in this MOA, the Tribe does not waive any rights it may have under federal or other law.

**KALISPEL TRIBE – ACTION AGENCY MOA**

**J. Notice**

1. Any notice permitted or required by the Good Faith provisions of this Agreement (Section IV.D), may be transmitted by e-mail or telephone to a Party's initial contact points, as that person is defined pursuant to the Good Faith provisions.
2. All other notices permitted or required by this Agreement shall be in writing, delivered personally to the persons listed below, or shall be deemed given five (5) days after deposit in the United States mail, addressed as follows, or at such other address as any Party may from time to time specify to the other Parties in writing. Notices may be delivered by facsimile or other electronic means, provided that they are also delivered personally or by mail. The addresses listed below can be modified at any time through written notification to the other Parties.

**Notices to BPA should be sent to:**

Vice President, Environment Fish & Wildlife  
Mail Stop KE-4  
Bonneville Power Administration  
P.O. Box 3621  
Portland, OR 97208-3621

**Notices to the U.S. Army Corps of Engineers should be sent to:**

U.S. Army Corps of Engineers, Northwestern Division  
Chief, Planning, Environmental Resources and Fish Policy Support Division  
1125 NW Couch Street  
Suite 500  
P.O. Box 2870  
Portland, OR 97208-2870

**Notices to the U.S. Bureau of Reclamation should be sent to:**

Deputy Regional Director  
Bureau of Reclamation  
Pacific Northwest Region  
1150 N. Curtis Rd., Suite 100  
Boise, ID 83706

**Notices to the Kalispel Tribe should be sent to:**

Director, Department of Natural Resources  
Kalispel Tribe of Indians  
P.O. Box 39  
Usk, WA 99180

**KALISPEL TRIBE – ACTION AGENCY MOA**

**K. List of Attachments**

Attachment A – BPA Funding for Kalispel projects (spreadsheet)

Attachment B – Narrative description and benefits of projects

Attachment C – Action Plan

**SIGNATURES**

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Stephen J. Wright  
Administrator and Chief Executive Officer  
Bonneville Power Administration

Date

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Robert A. Tipton, P.E  
Colonel, U.S. Army  
Division Commander

Date

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Bruce A. Estok  
Colonel, U.S. Army  
Commander, Seattle District

Date

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Lorri J. Lee  
Regional Director  
U.S. Bureau of Reclamation  
Pacific Northwest Region

Date

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Glen Nenema  
Chair, Tribal Council  
Kalispel Tribe

Date